United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: August 4, 2006

TO : Robert W. Chester, Regional Director
Region 18

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: First Student, Inc.
Case 18-CA-18030

This BE & K[1] case was submitted for advice as to whether the Employer's concluded lawsuit violated Section 8(a)(1). We conclude that the Region should dismiss the charge absent withdrawal.

FACTS

The Employer operates a school bus system serving public schools in Iowa City and Coralville, Iowa. In early 2006, some of its employees contacted Teamsters Local 238 (the Union) regarding representation, and the Union began an organizing campaign that led to the filing of a petition in April 2006.

Also in early April, the Union set up an almost continuous demonstration at the Iowa City facility, during which it parked a camper van and a rented truck just outside the gates for 24 hours a day, seven days a week. The Union also kept a fire barrel, in which it maintained warming fires, and a barbeque grill, for cookouts, near the vehicles. Employees and Union officials handbilled employees entering and leaving the facility, and waved signs at passing traffic.

Managers called the police several times to have the Union's vehicles ticketed or towed, to complain about smoke from the barbeque and burn barrel obscuring drivers' view from its driveway, and to complain that the handbillers were impeding traffic flow in and out of the facility. The police declined to take any action to stop the Union's activities.[2]

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[1] BE & K Constr. Co. v. NLRB, 536 U.S. 516 (2002).

[2] Police initially told the Employer that the Union's vehicles were on the public right-of-way and could not be removed. The Employer eventually had a survey done of its property line, which showed that the vehicles extended a foot or two onto the Employer's private property. Once

On April 8, there was a union rally at a city park, and when some employees and Union officials returned in the late afternoon to the van parked outside the Employer's facility, they noticed that their burn barrel had been put in the dumpster inside the Employer's fence. They called the police for advice, and a police officer came and escorted a few of those present onto the property to retrieve the barrel. When the manager of the facility found out that the protesters had retrieved the barrel, she called the police to report an act of trespass. The police declined to take any action, and explained that they had escorted employees and a Union official onto the property.

On May 1, the Employer filed a suit in county court against the Union for Injunction and Damages. The complaint alleged that members of the Union had stopped and physically threatened employees entering and leaving the property; had lit fires which produced smoke that blocked the view of drivers near the gates; had trespassed on the Employer's property after hours and without permission; had parked vehicles at the same location for more than 48 hours, in violation of Iowa City ordinance 9-4-4; had interfered with ingress and egress to a business establishment, in violation of Iowa City ordinances 10-2-2 and 6-1-2; had burned open fires in violation of Iowa City ordinance 6-6-1; and generally had created a public nuisance that interfered with the Employer's comfortable enjoyment of its property. The complaint sought an injunction and damages "sufficient to compensate [the Employer] for its damages."

The complaint was accompanied by an affidavit from the manager of the Iowa City facility, in which she stated that she had personally observed the facts pled in the complaint.

On May 8, the Iowa District court held a hearing on the Employer's motion for a temporary injunction and denied the motion.[3] The Employer subsequently filed an unsolicited motion to dismiss the entire matter without prejudice.

ACTION

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informed of the survey results, the Union moved the vehicles so that they were completely on public property.

[3] The court did not make a determination on the merits, but stated only that a preliminary, temporary injunction was not appropriate because "the petition ... seeks to enjoin the Defendant from violating existing laws without any showing that local enforcement agencies have determined that any criminal violations have occurred. Plaintiff's complaints, if verifiable, should be directed to those agencies rather than the civil courts."

The Region should dismiss the charge, absent withdrawal, because there is insufficient evidence that the suit was baseless and retaliatory.

In BE & K, the Supreme Court held that the Board must determine whether a completed lawsuit lacked a reasonable basis before finding the lawsuit unlawful.[4] Because the Court did not articulate in BE & K the standard for deciding whether a completed lawsuit was baseless, the Bill Johnson's standard for evaluating whether ongoing lawsuits are baseless remains authoritative.[5] In that case, the Court stated that the Board could not make credibility determinations or draw inferences from disputed facts because that would usurp the fact-finding role of the judge or jury.[6] Thus, a completed lawsuit lacked a reasonable basis only if it presented unsupportable facts or unsupportable inferences from facts or presented "plainly foreclosed" or "frivolous" legal issues.

The Court in BE & K also rejected the Board's standard of finding a concluded, non-meritorious, but reasonably based lawsuit unlawfully retaliatory solely because it was brought with a motive to "interfere with the exercise of [Section 7] rights." With regard to reasonably based suits, the Court held that such a standard would interfere with genuine petitioning.[7] However, the Court limited this holding to reasonably-based lawsuits.[8] Thus, even after BE & K, the analysis of retaliatory motive as to baseless lawsuits continues to be that set forth in Bill Johnson's. Under that analysis, if a lawsuit is directed at activity which would be protected but for the employer's allegations that it involved unprotected conduct, and the employer's allegations are baseless, the suit is an unlawful retaliatory lawsuit.

Here, however, the Region should dismiss the charge because there is insufficient evidence that the suit was

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[4] 536 U.S. at 535-537.

[5] Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983).

[6] Id. at 744-746. See also Beverly Health and Rehabilitation Services, 331 NLRB 960, 963 (2000).

[7] BE & K Constr. Co., 536 U.S. at 533-534.

[8] Id..

baseless and retaliatory.[9] The Employer's allegations were well pled in fact and law. Thus, the complaint pled violations of several ordinances, and appended supporting affidavit evidence describing facts which, if true, could constitute the violation of those ordinances. The complaint's more general allegations of physically threatening conduct, of unlawful trespass, and of creating an unlawful "nuisance" were not baseless on their face[10] and depended on the resolution of factual and credibility disputes as to which the Board should not usurp the fact-finding role of the judge or jury. The Union has not presented any argument that would show that this lawsuit was baseless in fact or law.

Accordingly, the Region should dismiss the charge absent withdrawal.

B.J.K.

[9] We would not dismiss solely on the grounds that the suit was not retaliatory, because, if the Employer's arguments regarding trespass and nuisance were baseless, then the suit was retaliatory because it was directed at the protected activity of standing/parking outside the employer's gates and handbilling employees and customers regarding the organizing campaign.

[10] A quick review of Iowa trespass law revealed that entering another's property might violate the law even where the alleged trespassor consulted with law enforcement officials prior to entering. See Stoecker v. Stephens, 711 N.W.2d 733 (2006).